(9)

No. 86-6139

Supreme Court, U.S.
FILED
NOV 13 1987
JOSEPH F. SPANIOL, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1987

CLARA WATSON, PETITIONER

v.

FORT WORTH BANK AND TRUST

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the decisions resulting from a subjective promotion process are subject to challenge under the disparate impact analysis approved by this Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

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INTEREST OF THE UNITED STATES

The Attorney General and the Equal Employment Opportunity Commission (EEOC) have significant Title VII enforcement responsibilities. See 42 U.S.C. 2000e-5. The United States, as the nation's largest employer, is also subject to Title VII obligations. Finally, the proper interpretation of the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. Pt. 1607, promulgated by various agencies of the United States in 1978, is also at issue here.

STATEMENT

1. Petitioner, Clara Watson, is a black woman. She was hired in August 1973 by respondent, Fort Worth Bank & Trust, as a proof operator; in January 1976, respondent promoted her to a position as a teller in its motor bank; and, in February 1980, it promoted her to a position as a commercial teller in its main lobby (J.A. 205). During the next year, petitioner applied unsuccessfully on four occasions for promotion to supervisory

positions (J.A. 205-206). In August 1981, she resigned from her employment with respondent (J.A. 192-194).

2. On October 1981, petitioner filed this Title VII action (42 U.S.C. 2000e *et seq.*), alleging that respondent had discriminated against her and other blacks in hiring, promotion, and other employment decisions (J.A. 178, 206). On motion, the district court certified petitioner to represent a class consisting of all blacks who had applied to, would apply to, or were employed by respondent on October 21, 1979, or any time thereafter (J.A. 190).

At trial, petitioner recounted her employment history and her unsuccessful attempts to obtain promotion to a supervisory position (J.A. 4-50). She further showed that respondent had no black directors or officers, that only one black had held a supervisory position during the 1975-1983 period, and that blacks constituted only 13% of respondent's workforce during the 1981-1983 period (J.A. 194). Finally, petitioner had a statistician testify, based on limited applicant flow and other data, that a black applicant had one-fourth the chance of a white applicant to get a job with respondent; that a black employee was likely to receive approximately $46.00 less per month than a white employee would receive for comparable work; and that respondent had advanced black employees at a rate six-tenths of a pay grade per year more slowly than similarly situated white employees (J.A. 242-250).

Respondent countered with evidence explaining why petitioner had not been promoted (J.A. 190-194, 196-197). In addition, respondent showed that an outside consultant had designed its promotion and evaluation process, that the process had been structured to inform employees of the standardized criteria by which they would be judged,[1] and that the process assured employees that they would be evaluated by the supervisors with whom they worked on a daily basis, subject only to

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[1] The standardized criteria, as to which supervisors were required (at least for salary evaluation purposes) to assign point values, included accuracy of work, alertness, personal appearance, supervisor-co-worker relations, quantity of work, physical fitness, attendance, dependability, stability, ambition, friendliness, courtesy, job knowledge, and experience. See J.A. 131-135, 137-138, 246 n.26.

general review (and rare reversal) by respondent's highest officials (J.A. 194-195; II Tr. 80-92). Respondent also pointed out that petitioner's sample size was in many respects too small for drawing legitimate statistical inferences and that her statistician had not considered the relative qualifications of the persons in the applicant pool, the distribution of applicants for specific openings, or the influence of market factors (II Tr. 181-196). Finally, respondent demonstrated that blacks comprised 11.8%, 10.2%, and 22.8% of the population of the county, metropolitan area, and city, respectively (J.A. 202).

Based on this evidence, the district court found (J.A. 199-201) that existing black employees (such as petitioner) did not share a common question of law or fact with nonemployee applicants and that existing employees formed too small a group to satisfy the "numerosity" requirement of Fed. R. Civ. P. 23(a); accordingly, it subdivided the class into applicants and employees and held that petitioner could not advance claims on behalf of either class (J.A. 207). On the merits, the court held that respondent's articulated reasons for failing to promote petitioner were not pretextual and that, although petitioner "made allegations of discrimination by defendant in hiring, compensation, initial placement, promotions, * * * and other terms and conditions of employment, there [was] little or no evidence of discrimination in these categories" (J.A. 197, 201). Finally, after finding that petitioner had "proceeded zealously on behalf of the group of blacks who applied for employment [with] the [b]ank," it ruled that "no discrimination against blacks as a class ha[d] been proved on the basis of defendant's hiring practices" (J.A. 202).

3. The court of appeals affirmed in part and reversed in part (J.A. 204-252). It rejected petitioner's argument that the district court had abused its discretion in decertifying the class and in holding that petitioner was not a proper class representative (J.A. 208-212). On the merits, it held that "a Title VII challenge to an allegedly discretionary promotion system is properly analyzed under the disparate treatment model rather than the disparate impact model" (J.A. 213), that there was "no indication in the record, nor [was] there any suggestion * * * by [petitioner], * * * that the district court neglected to consider the

statistical evidence presented by [petitioner] in terms of evaluating the credibility of the [respondent's] proffered explanations for its promotion decisions" (J.A. 214 n.13), and that "the district court's finding that the [b]ank's explanations for its action were not pretexts for discrimination is not clearly erroneous" (J.A. 215). Finally, the court held that the hiring discrimination claims of the applicant class should have been dismissed without prejudice (since there was no proper class representative); it remanded the case for this purpose (J.A. 217-218).[2]

SUMMARY OF ARGUMENT

A. Disparate treatment was the principal evil Congress had in mind when it enacted Title VII. The Title VII enforcement community soon observed, however, that employers were continuing to use standardized tests and other objective credential requirements which often had an adverse exclusionary effect on members of groups protected by Title VII and which bore no manifest relationship to the employment in question. It was in response to this concern that the Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), first approved use of disparate impact theory as a means of establishing unlawful employment discrimination. The Court held that a Title VII violation may be stated without proof of motive where an objective selection device disproportionately excludes protected individuals from employment opportunities and is not "manifestly related" to the requirements of the job. The Court has consistently reaffirmed that holding where objective selection devices have been in issue. But the Court has also been unwilling to accept the general proposition that a showing that an employment practice has an adverse effect on members of a protected group is always sufficient to establish a prima facie Title VII violation. Indeed, the Court has at least twice implied that, in challenges to sub-

[2] Judge Goldberg dissented (J.A. 219-252). He agreed with petitioner that the district court had abused its discretion in decertifying the plaintiff class and in failing to find that a pattern and practice of class-wide disparate treatment existed (J.A. 222-236, 236-251). He thus found "it unnecessary to decide whether [petitioner] could have proceeded under a disparate impact model as well" (J.A. 237 (footnote omitted)).

jective selection processes, only disparate treatment, and not disparate impact, theory applies. See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973); *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567 (1978).

B. Disparate treatment theory provides the protection that Congress intended against any discriminatory animus or cultural bias that may arise from the use of subjective selection processes. Selection processes are subjective when they are discretionary and nonmechanical and depend upon the mental operations of the decisionmaker. This Court has routinely rejected arguments that disparate treatment analysis is unsuited to the task of examining the legality of subjective selection devices. Courts have often found disparate treatment to exist where a subjective selection process with an adverse impact has inexplicably been used. That petitioner failed to prevail on her disparate treatment claim here does not show that disparate treatment analysis is an inadequate response to discriminatory subjective decisionmaking; it shows rather that petitioner failed to convince the courts below that she was a victim of such discriminatory decisionmaking.

C. Extending disparate impact theory to employee selections resulting from subjective processes would undermine other policies with which Congress was concerned in adopting Title VII. Disparate impact analysis is simply not suited to investigating whether the decisionmaking processes that constitute subjective selection procedures are discriminatory or not. A defendant could rarely, if ever, validate or otherwise formally substantiate its subjective judgments. Subjective judgments typically assess intangible qualities, which cannot be measured in the manner that is necessary for validation or other formal substantiation. Accordingly, applying disparate impact theory to the decisions resulting from subjective selection processes would inevitably lead employers either to abandon subjective processes or, where such replacement is too burdensome, restrictive, or expensive, to superimpose numerical quotas on employment systems using subjective devices. Neither result would be consistent with the intent of the 1964 Congress.

D. The Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. Pt. 1607 (1978), do not provide that subjec-

tive selection processes must be validated or otherwise formally substantiated. On the contrary, the Guidelines provide that, where a subjective selection process is in issue, an employer may "justify continued use of the procedure in accord with Federal law." The United States and the EEOC believe that an employer can justify "continued use of the procedure in accord with Federal law" by showing that its recourse to and application of a particular subjective selection process is reasonably related to the requirements of the job or other business need, as in any disparate treatment case.

ARGUMENT

THE DECISIONS RESULTING FROM A SUBJECTIVE PROMOTION PROCESS MAY BE SCRUTINIZED EFFECTIVELY UNDER THE DISPARATE TREATMENT ANALYSIS AND SHOULD NOT ALSO BE SUBJECTED TO CHALLENGE UNDER THE DISPARATE IMPACT ANALYSIS

Petitioner contends that the outcomes of subjective promotion processes like that employed by respondent must pass muster under the disparate impact analysis of *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). Based on our understanding of the Court's cases (including *Griggs* itself), our experience in administering Title VII of the Civil Rights Act, the balance struck by Congress in 1964, and the Uniform Guidelines on Employee Selection Procedures, we submit that this Court should join the courts below in rejecting petitioner's contention.

A. Disparate Impact Analysis has Been Applied Only to Selection Devices That Do Not Assess Each Person's Suitability for Employment in an Individualized Way

We begin by placing the Court's disparate impact decisions in historical perspective. This Court has said, and the legislative history of the 1964 enactment makes clear, that "[u]ndoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII." *Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977). In the wake of the statute's passage, however, another more subtle form of discrimination became of increasing concern to the Title VII enforcement com-

munity. Employers, often in good faith and without intent to discriminate, continued to use standardized tests and other credential requirements to select among competitors for hiring and promotion. Such devices provided an easily applied (albeit approximate) measure of employee quality, were inexpensive to administer, produced consistent and comparable results, and, by limiting personnel officers' discretion, served to provide assurance that Title VII's proscription against intentional discrimination was being obeyed.[3] Title VII enforcement officials became concerned, however, that use of these objective selection devices had an unjustified exclusionary effect on members of protected minority groups, because of such factors as underlying patterns of educational and cultural deprivation (or other factors beyond those individuals' control), which assumed undue prominence in respect to such devices.[4] Accordingly, Title VII enforcement officials and other civil rights advocates increasingly began to argue that Congress had intended to prohibit employers from using any objective selection device that overstates or misstates what is necessary for competent job performance.

It was against this background that the Court in *Griggs* first approved use of disparate impact theory as a means of establishing unlawful employment discrimination under Section 703(a)(2) of the statute.[5] At issue in *Griggs* were a written aptitude test and a high school diploma requirement that the Duke

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[3] See W. Byham & M. Spitzer, *The Law and Personnel Testing* 62 (1971); Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598, 1637-1638 (1969).

[4] See Rachlin, *Title VII: Limitations and Qualifications*, 7 B.C. Indus. & Com. L. Rev. 473, 483-488 (1966); Note, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1114-1115, 1120-1141 (1971); Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education*, 68 Colum. L. Rev. 691, 706-712 (1968).

[5] Section 703(a)(2) of the statute makes "[i]t unlawful • • • for an employer • • • to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin" (42 U.S.C. 2000e-2(a)(2)).

Power Company had adopted, according to the district court, for the non-discriminatory purpose of improving the general quality of the workforce. Reversing the court of appeals' holding that, in the absence of a discriminatory purpose, Title VII did not prohibit the use of such objective selection devices, this Court observed that "[t]he objective of Congress in the enactment of Title VII * * * was to achieve equality of employment opportunities and [to] remove barriers that have operated in the past to favor an identifiable group of white employees over other employees" (401 U.S. at 429-430). The Court stated that "Congress has now required that the posture and condition of the job-seeker be taken into account" (*id.* at 431) and that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability"; rather, the Court said, in such situations "Congress has placed on the employer the burden of showing that any given requirement * * * ha[s] a manifest relationship to the employment in question" (*id.* at 432).

The decision in *Griggs* thus responded directly to the Title VII enforcement community's concern that nondiscretionary selection devices, by failing to give individualized consideration to a person's ability to perform a job, unnecessarily exclude protected employees from substantial employment opportunities.* Where such objective, facially neutral selection devices have been at issue, the Court has consistently reaffirmed that a Title VII violation may be established without a finding of discriminatory purpose. See, *e.g.*, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975) (written tests); *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977) (height and weight requirements); *New York City Transit Auth.* v. *Beazer*, 440 U.S. 568 (1979) (anti-narcotics rule); *Connecticut* v. *Teal*, 457 U.S. 440 (1982) (written examination).

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* In a brief amicus curiae in *Griggs*, the United States asked the Court to respond to the exclusionary problems created by these nondiscretionary selection devices. Contrary to petitioner's suggestion (Br. 16-17), the United States did not in that brief argue that disparate impact theory should be applied to all conceivable selection processes. For the Court's convenience, we are lodging copies of our brief in *Griggs* with the Clerk.

Contrary to petitioner's argument (Br. 15-20), however, the Court has not treated disparate impact analysis as the rule and disparate treatment analysis as the exception. In fact, the Court since *Griggs* has refused to accept the proposition that a prima facie Title VII violation may be established without proof of discriminatory motive in *every* circumstance in which an employment practice or combination of employment practices has an adverse effect on a protected group. Thus, in *Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 711 n.20 (1978), the Court rejected the contention that the adoption of a gender neutral pension plan "would itself violate Title VII because of its disproportionately heavy impact on male employees. Cf. *Griggs* v. *Duke Power Co.*, 401 U.S. 424." The Court said (435 U.S. at 711 n.20):

> * * * [U]nder Title VII * * * the male employees would not prevail. Even a completely neutral practice will inevitably have *some* disproportionate impact on one group or another. *Griggs* does not imply, and this Court has never held, that discrimination must always be inferred from such consequences.

Moreover, where non-mechanical selection processes have been in issue, the Court has consistently inquired only whether Title VII plaintiffs have successfully proven—by statistics or other evidence—the presence of discriminatory motivation. See, *e.g.*, *Bazemore* v. *Friday*, No 85-93 (July 1, 1986); *Hazelwood School Dist.* v. *United States*, 433 U.S. 299 (1977); *Teamsters* v. *United States*, *supra*. Indeed, the Court has at least twice strongly implied that disparate impact theory is inapplicable in challenges to subjective selection processes.

McDonnell Douglas Corp. v. *Green*, 441 U.S. 792, 805-807 (1973), concerned a discretionary decision not to rehire an individual who had participated in unlawful conduct directed against an employer. Contrasting such a decision with the type of mechanical decisionmaking processes that were in issue in *Griggs*, the Court noted (411 U.S. at 806 (citation omitted)) that *Griggs*

> dealt with standardized testing devices which, however neutral on their face, operated to exclude many blacks who were capable of performing effectively in the desired posi-

> tions. *Griggs* was rightly concerned that childhood deficiencies in * * * education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives. Respondent, however, appears in different clothing. * * * [His employer] does not seek his exclusion on the basis of a testing device which overstates what is necessary for competent performance, or through some sweeping disqualification * * *. [His employer] assertedly rejected [him] for unlawful conduct * * * and * * * this cannot be thought the kind of "artificial, arbitrary, and unnecessary barriers to employment" which the Court found to be the intention of Congress to remove.

Accordingly, the Court did not require the employer to demonstrate that its subjective refusal to rehire had a manifest relationship to the requirements of the job (*id.* at 805-806).[7]

In *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 572, 575 (1978), the Court expressly refused to apply the disparate impact analysis to an employer's practice of hiring only those persons whom his superintendent knew were experienced or had been recommended. The Court contrasted the selection device in issue there with "employment tests * * * or particularized requirements such as * * * height and weight specifications" (*id.* at 575 n.7), as were involved in *Griggs*, *Albemarle Paper Co.*, and *Dothard* v. *Rawlinson*.[8]

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[7] As petitioner notes (Br. 22), there was no evidence of group-wide disparate impact in *McDonnell Douglas*. But that is not the reason the Court gave for rejecting application of the *Griggs* "manifest relationship" requirement; rather, the Court in *McDonnell Douglas* said that the employer was not subject to the more stringent *Griggs*-defense because the challenged practice was a "predictive evaluation resistant to empirical proof" (411 U.S. at 806 n.21).

[8] Petitioner seeks to distinguish *Furnco* (Br. 23) on the ground that there was no showing that the employer's hiring practices had a disparate impact. But this distinction does not explain why the Court "foreclose[d] on remand further litigation on the *Griggs* question of whether [the employer's] hiring practices had a disparate impact" (*Furnco Constr. Corp.* v. *Waters*, 438 U.S. at 583 (Marshall, J., dissenting)). That is why various commentators have concluded that the Court in *Furnco* held disparate impact theory inapplicable in challenges to subjective selection processes. See, *e.g.*, 3 A. Larson & L.Larson, *Employment Discrimination* § 76.32, at 15-83 to 15-85 (1986)

McDonnell Douglas and *Furnco* illustrate that the Court has heretofore declined to extend the disparate impact analysis beyond the particular form of employment discrimination associated with the use of objective, mechanical selection devices. It has said that an employer "limit[s], segregate[s], or classif[ies] his employees or applicants" within the meaning of Section 703(a)(2) when, by using such a device, the employer separates individuals into uniformly defined groups from which ultimate employment decisions will be made; and where the device is not job-related and has a statistically significant adverse effect on members of a protected group, the Court has said that the "limit[ation], segregat[ion], or classif[ication]" "deprive[s] or tend[s] to deprive any individual of employment opportunities or otherwise adversely affect[s] his status as an employee, because of such individual's race, color, religion, sex, or national origin" (42 U.S.C. 2000e-2(a)(2)). But the Court has also strongly implied that an employer does not "limit, segregate, or classify his employees or applicants" within the meaning of Section 703(a)(2) when it makes subjective decisions about particular employees or applicants, even though a series of those decisions may cumulatively result in a numerical or proportional racial disparity in the employer's workforce.[9] Rather, the Court has indicated that such cases are properly treated as

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[hereinafter Larson]; Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After* Beazer *and* Burdine, 23 B.C. L. Rev. 419, 438-439 (1982); AFL-CIO Br. at 10-11, in *Connecticut* v. *Teal, supra.*

[9] See *McDonnell Douglas Corp.*, 411 U.S. at 805-806; *Furnco Constr. Corp.* v. *Waters*, 438 U.S. at 575 n.7, 578; *Teamsters*, 431 U.S. at 334-336, 339-340 n.20.

Where mixed-component or multi-step selection processes are involved, of course, the Court has said that a plaintiff may challenge any objective component of that process for its own disparate impact. See *Connecticut* v. *Teal, supra.* But petitioner has not attempted to do so in this case. Rather, she challenges the selection process as a whole, which she characterizes as subjective and discretionary. See Pet. Br. 4-6, 40, 47-48. Because the selection process includes both objective factors and subjective discretion, we agree that it should be treated as subjective and further submit that it should be challengeable only under the disparate treatment theory. See Larson § 76.34, at 15-85 to 15-86, 15-91 to 15-98.

arising under Section 703(a)(1) of the statute[10] and as involving only a possible "pattern or practice" of intentional discrimination.[11]

B. Disparate Treatment Analysis Provides Ample Protection Against Possible Discriminatory Animus or Cultural Bias Arising from the Use of Subjective Selection Devices

Petitioner's principal reason for suggesting that disparate impact analysis should be applied to subjective selection devices is (Br. 34-44) that, in her view, disparate treatment analysis does not provide sufficient protection against the discriminatory animus or cultural bias that may arise from the application of those devices. We disagree.

1. Subjective selection devices involve, in this Court's words, "predictive evaluation[s]" that are "resistant to empirical proof" (*McDonnell Douglas Corp.*, 441 U.S. at 806 n.21). Such devices include decisional components of unstructured personnel processes (*e.g.*, personal interviews for purposes of hiring

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[10] Section 703(a)(1) provides that it is "unlawful • • • for an employer • • • to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin" (42 U.S.C. 2000e-(2)(a)(1)).

The Court, of course, has never resolved whether a finding of discriminatory motive is necessary in all cases properly characterized as arising under Section 703(a)(1). See *Nashville Gas Co.* v. *Satty*, 434 U.S. 136, 141-145 (1977). Nor need it decide that question here. This case concerns only whether a challenge to a series of subjective selection decisions requires a finding of discriminatory motive, and not whether every challenge properly characterized as arising under Section 703(a)(1) requires such a finding.

[11] See *Bazemore* v. *Friday*, slip op. 10-13; *Hazelwood School Dist.*, 433 U.S. at 306-313; *Teamsters*, 431 U.S. at 334-340.

Petitioner's suggestion (Br. 22-23) that the subjective practices in issue in *Hazelwood* and *Teamsters could* successfully have been challenged under the disparate impact theory is nothing more than a bootstrapping of her argument that subjective selection processes *should* be subjected to disparate impact analysis. Moreover, it is inconsistent with the statement in *Teamsters* (431 U.S. at 339-340 n.20 (emphasis added)) that "statistical evidence [cannot be] offered or used to support an erroneous theory that Title VII requires an employer's work force to be racially balanced. Statistics showing racial or ethnic imbalance *are probative* in a case such as this one *only because* such imbalance is often a telltale sign of *purposeful discrimination*."

decisions, or supervisor ratings based on personal experience with candidates for purposes of promotion decisions) and assessments based on unstructured weighing of specified objective considerations (such as grades, prior experience, and references). The common attribute of subjective selection processes is their reliance on judgment, intuition, and discretion.[12] Mental operations such as these are, of course, the focus of disparate treatment analysis and this Court has repeatedly rejected arguments that this analysis is inadequate to its task. See, *e.g.*, *U.S. Postal Serv. Bd. of Govs.* v. *Aikens*, 460 U.S. 711, 716-717 (1983); *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 256-260 (1981).

The Court's confidence in disparate treatment analysis is equally appropriate here. Courts applying disparate treatment analysis have consistently found decisions resulting from inexplicable and unwarranted recourse to subjective selection processes to be motivated by discriminatory intent. See generally B. Schlei & P. Grossman, *Employment Discrimination Law* 191-205 (1983); Denis, *Subjective Decision Making: Does it Have a Place in the Employment Process?*, 11 Empl. Rel. L.J. 270-276 (1985). Courts are well aware that subjective selection processes are "vulnerable to either conscious or unconscious discrimination by the evaluating supervisors" (*Wade* v. *Mississippi Coop. Ext. Serv.*, 528 F.2d 508, 518 (5th Cir. 1976)), especially where the evaluating supervisor is of a race or sex different from that of the applicant (see, *e.g.*, *Royal* v. *Missouri Hwy. & Transp. Comm'n*, 655 F.2d 159, 164 (8th Cir. 1981); *Nanty* v. *Barrows Co.*, 660 F.2d 1327, 1334 (9th Cir. 1981)). Likewise, courts have found discriminatory treatment where the employer has no substantial job or business-related reason for employing an entirely subjective selection process—as is often true when the employer is filling jobs that require minimal or easily quantified skills. See, *e.g.*, *Parson* v. *Kaiser Aluminum & Chem. Corp.*, 575 F.2d 1374, 1385-1386 (5th Cir. 1978), cert. denied, 441 U.S. 968 (1979); *Rowe* v. *General Motors Corp.*, 457 F.2d

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[12] The American Psychological Association (APA) reaches a similar conclusion in its brief amicus curiae in this case. See Br. 5 (citation omitted) ("Most simply, '[m]easures that require the statement of opinion, beliefs, or judgments are considered subjective.' ").

348, 359 (5th Cir. 1972). Moreover, this Court's decisions in "pattern and practice" disparate treatment cases make clear that statistically significant disparities may be used in appropriate circumstances to infer discriminatory intent.[13] And, following these "pattern and practice" decisions, the courts of appeals have consistently held that unwarranted recourse to subjective selection processes can provide the missing link between statistical disparities and illegal discrimination. See, *e.g.*, *Bauer* v. *Bailar*, 647 F.2d 1037, 1045 (10th Cir. 1981); *Stewart* v. *General Motors Corp.*, 542 F.2d 445, 450-451 (7th Cir. 1976), cert. denied, 433 U.S. 919 (1977). Thus, both theory and practice confirm that disparate treatment theory is an effective tool for ferreting out discriminatory subjective decisionmaking.

2. Petitioner, however, suggests (Br. 24-25, 35, 41-44), as did the Ninth Circuit in *Atonio* v. *Wards Cove Packing Co.*, 810 F.2d 1477 (1987) (en banc), that subjective selection processes may conceal discriminatory intent too difficult to establish because these processes often reflect routine adherence to past decisions whose original purposes are undiscoverable. But this suggestion is unwarranted. A plaintiff may properly urge an inference of discriminatory intent on the basis of objective factors, such as the race or sex of the individual making the selection decisions, the absence of controls to ensure that nondiscriminatory decisions result, or an inevitable or foreseeable adverse impact of a subjective selection process. *Personnel*

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[13] As the Court said in *Teamsters*, 431 U.S. at 339-340 n.20 (emphasis added):

> *Statistics showing racial or ethnic imbalance are probative in a case such as this one [involving subjective hiring practices] only because such imbalance is often a telltale sign of purposeful discrimination*: absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. *Evidence of a longstanding and gross disparity between the composition of a work force and the general population thus may be significant even though [Section] 703 (j) makes clear that Title VII imposes no requirement that a work force mirror the general population.*

See also *Hazelwood Sch. Dist.*, 433 U.S. at 307-308; *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977).

Adm'r v. *Feeney*, 442 U.S. 256, 279 n.25 (1979); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977); *Teamsters*, 431 U.S. at 336-339. Importantly, as noted above, the fact that an employer cannot provide a job or business-related reason for using a particular subjective selection process may also constitute evidence of discriminatory intent. Thus, an employer plainly cannot expect to rebut a prima facie statistical showing of discriminatory treatment with an apology that such consequences are merely the result of a longstanding practice with an unknowable purpose. Rather, as a practical matter, the employer must show that its recourse to, and its particular applications of, the selection process are reasonably related to the requirements of the job or other business need. Accord, B. Schlei & P. Grossman, *supra*, at 1287-1288; Denis, *supra*, 11 Empl. Rel. L.J. at 270-276.

Nor is there merit to the concern voiced by petitioner (Br. 36-41) and the Eleventh Circuit (see *Griffin* v. *Carlin*, 755 F.2d 1516, 1525 (1985)) that the disparate impact theory must be extended to subjective selection processes in order to prevent employers from abandoning unvalidated objective selection practices and substituting subjective selection processes in their place. This extension simply turns *Griggs* on its head. The very purpose of the *Griggs* decision was to require employers to *abandon* unvalidated objective selection practices (where those practices had a disparate impact on a protected group). Moreover, *Griggs* and its progeny in this Court make clear that Title VII leaves employers with the choice of adopting validated objective selection devices or considering each employee or applicant individually.[14] And, in any event, there are a host of pressures that keep employers from unwarranted and pretextual recourse to subjective selection processes: objective selection devices in many circumstances are the only efficient means of selection and the pressures of competitive markets will compel

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[14] See *Griggs*, 401 U.S. at 431-433; *Furnco Constr. Corp.* v. *Waters*, 438 U.S. at 578. Accord, Larson § 76.33, at 15-86 to 15-87 ("The duty imposed by Title VII is a duty to refrain from racial discrimination in employment. If an employer can manage to comply with the duty without the aid of formally devised and implemented objective criteria, he cannot be held to have violated the Act.").

their adoption; unions typically attempt to reduce managerial discretion by demanding that employers, especially public employers, adopt objective selection devices; and, as explained above, employers have a strong incentive to be on guard against statistical disparities that may form the basis of expensive disparate treatment litigation.[15]

3. In this case, of course, petitioner also made a disparate *treatment* claim of just the sort that we have described. In support of this claim, she introduced evidence concerning her own attempts to obtain promotions, the identity of the persons who denied her those promotions, the subjectivity of respondent's selection process, and statistics purporting to show that the bank had engaged in a pattern and practice of racially discriminatory decisionmaking. In response, respondent explained why petitioner was denied promotions, described the origin, purpose, and operation of its subjective selection process, noted the inadequacy of petitioner's sample size, and introduced evidence to undermine any adverse inferences that might arise from petitioner's statistical proof. Based on its evaluation of the entire record, the district court found that respondent had legitimate nondiscriminatory reasons for not promoting petitioner, a finding that was affirmed on appeal (with one judge dissenting), and that this Court has not chosen to review. Cf. *Goodman* v. *Lukens Steel Co.*, No. 85-1626 (June 19, 1987), slip op. 7-8. That petitioner failed to prevail on her disparate treatment claim does not show that disparate treatment analysis is an inadequate response to discriminatory subjective decisionmaking; it shows rather that petitioner failed to convince the courts below that she was a victim either of individual discriminatory actions or of a pattern and practice of discriminatory subjective decisionmaking. Therefore, Title

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[15] Petitioner cites selective sources in suggesting (Br. 38, 41) that there has been a decline in the use of objective selection devices. Other sources contend that recent empirical data show that use of objective selection practices is on the rise. See, e.g., Haney, *Employment Tests and Employment Discrimination: A Dissenting Psychological Opinion*, 5 Empl. Rel. L. J. 1, 2 n.4 (1982).

VII's policy against employment discrimination has been appropriately served in this case.[16]

C. Extending Disparate Impact Analysis to the Decisions Resulting from Subjective Selection Processes Would Upset Congress's Delicate Balance of Competing Concerns in Title VII

Disparate impact theory should not be extended to subjective selection processes. To do so would undermine other important policies that Congress embodied in Title VII.

1. In cases involving statistical disparities, the principal difference between disparate treatment and disparate impact analysis is the showing that a defendant must make in order to rebut a prima facie case of discrimination.[17] In a disparate treatment case based on statistical evidence, the defendant must provide evidence of the "legitimate, nondiscriminatory" reasons it had for the actions it took and in that way refute the inference that an improper discriminatory motive was at work. See *Bazemore* v. *Friday*, slip op. 10-13. By contrast, in a disparate impact case, the defendant must make the more rigorous initial showing that the selection device producing the statistical disparity has a "manifest relationship" to successful job performance or to the safe and efficient operation of its business. See *Griggs*, 401 U.S. at 432. As a practical matter, a defendant

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[16] Petitioner and the APA argue (Pet. Br. 45-49; APA Br. 22-27) that respondent's subjective selection process is defective in several respects and that respondent had no legitimate reason for failing to correct those infirmities (especially given the alleged racial disparity in its workforce). But petitioner did not present this evidence to the district court. Thus, if the result below is incorrect, the fault is not properly corrected in this Court and certainly does not inhere in the legal theories available to petitioner.

[17] There are prima facie and defense components to both disparate treatment and disparate impact analyses. See *Aikens*, 460 U.S. at 711 n.1. Where a plaintiff relies exclusively on statistical evidence, however, courts generally test the sufficiency of the prima facie showing by the same behavioral research norms, regardless of the legal theory being employed. See B. Schlei & P. Grossman, *supra*, at 98-99, 1287-1288, 1370-1375.

could rarely, if ever, actually validate or otherwise formally substantiate its subjective judgments or processes.

Where a showing of "manifest relationship" is required, the Court has said that "it is an insufficient response to demonstrate some rational basis for the challenged practices" (*Washington* v. *Davis*, 426 U.S. 229, 247 (1976)). Rather, the Court has said, an employer must show that the device challenged is "demonstrably a reasonable measure of job performance" (*Griggs*, 401 U.S. at 436), or that it otherwise "significantly serve[s]" legitimate business needs (*New York Transit Auth.* v. *Beazer*, 440 U.S. 568, 587 & n.31 (1979)). To do this, an employer ordinarily must (a) define the skills, abilities, or traits required for successful job performance, (b) collect or point to reliable data showing that its selection process measures those qualities, and (c) demonstrate by an appropriate "validation strategy"[18] or other means of formal substantiation[19] that the selection process has a sufficient connection with effective job performance or efficient

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[18] By "validation strategy," we refer to the three basic methods that the industrial psychology profession has developed for establishing the psychometric soundness of a selection device: "content" validity, "empirical" or "criterion-related" validity, and "construct" validity. See *Albemarle Paper Co.*, 422 U.S. at 431; *Washington* v. *Davis*, 426 U.S. at 247 n.13.

[19] This Court has indicated that the necessary "manifest relationship" to job performance or business need may, in appropriate circumstances, be established by means other than by a formal validation strategy. See, *e.g.*, *Washington* v. *Davis*, 426 U.S. at 427 n.13; *Beazer*, 440 U.S. at 587 n.31; *United States* v. *South Carolina*, 445 F. Supp. 1094 (D.S.C. 1977), aff'd mem. *sub nom. National Education Ass'n* v. *South Carolina*, 434 U.S. 1026 (1978). Decisions of the courts of appeals reflect this judgment. See, *e.g.*, *Davis* v. *City of Dallas*, 777 F.2d 205, 217-218 (5th Cir. 1985), cert. denied, No. 85-1533 (May 19, 1986); *Aguilera* v. *Cook Cty. Police & Corrections Merit Bd.*, 760 F.2d 844, 847-848 (7th Cir.), cert. denied, 474 U.S. 907 (1985). In this regard, some cases indicate that, in appropriate circumstances, an employer may establish the necessary "manifest relationship" by merely articulating a facially reasonable job requirement. See, *e.g.*, *Yuhas* v. *Libbey-Owens-Ford Co.*, 562 F.2d 496, 498-500 (7th Cir. 1977), cert. denied, 435 U.S. 934 (1978); *Smith* v. *Olin Chemical Corp.*, 555 F.2d 1283, 1287-1288 (5th Cir. 1977) (en banc). The correctness of these decisions, which have some commonsense appeal, will ultimately have to be evaluated in light of this Court's various descriptions of the "manifest relationship" requirement. Compare *Albemarle Paper Co.*, 422 U.S. at 425-436, with *Beazer*, 440 U.S. at 587 n.31. But in almost no circumstance could an employer show that its subjective judgment

business operation. See *Washington* v. *Davis*, 426 U.S. at 246-252; *Albemarle Paper Co.*, 422 U.S. at 425-436. Though this process of job definition, data collection, and formal substantiation can be quite costly and time-consuming,[20] certain objective selection devices – such as reading ability tests and verbal skill requirements – have been shown to have the necessary "manifest relationship" to performance of particular jobs (especially those involving a small number of simple and repetitive tasks).[21]

By stark contrast, we have been unable to find a single reported case in which a subjective selection process was successfully substantiated by formal means.[22] The problem is that subjective selection processes are typically used to assess

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has a "manifest relationship" to the job by any means other than reasonable inference. Therefore, inferential reasonableness is all that can be required of selection practices that rely on the employer's subjective judgment.

[20] For discussions of the costs and complexities attendant to such efforts, see A. Outerbridge, Personnel Res. and Dev. Ctr., OPM, *TM-73-18, A Survey of Test Validation Study Costs* at 1 (Aug. 1979) (costs of studies surveyed ranged from $24,000 for measurement of a single characteristic to $1,245,00 for measurement of multiple characteristics); Lerner, *Employment Discrimination: Adverse Impact, Validity, and Equality*, 1979 Sup. Ct. Rev. 17, 18 n.6 (adequate validation study costs between $100,000 and $400,000); Gwartney, Asher, Haworth & Haworth, *Statistics, the Law and Title VII, An Economist's View*, 54 Notre Dame Law. 633, 643 (1979) (cost of measuring one simple characteristic ranges from $20,000 to $100,000).

[21] See Comment, *Courts, Psychologists, and the EEOC's Uniform Guidelines: An Analysis of Recent Trends Affecting Testing as a Means of Employee Selection*, 36 Emory L.J. 203 (1987) (summarizing developments); Booth & Mackay, *Legal Constraints on Employment Testing and Evolving Trends in the Law*, 29 Emory L.J. 121 (1980) (same).

[22] Professor Blumrosen surveys the cases and reaches the same conclusion. See Blumrosen, *The Legacy of* Griggs: *Social Progress and Subjective Judgments*, 63 Chi.-Kent L. Rev. 1, 22, 33-37 (1987). The NAACP Legal Defense and Education Fund, et al., errs in suggesting (Amicus Br. 29-30) that a subjective selection process was successfully validated in *Harrison* v. *Lewis*, 559 F. Supp. 943 (D.D.C. 1983). The employer in *Harrison* did produce a "replication study" of its selection procedures, but the court held that the study did "not in fact demonstrate the validity of [one] selection procedures * * *" (*id.* at 948).

Occasionally, courts have upheld subjective decisionmaking processes against disparate impact attacks, but only by judging the facial reasonableness

intangible qualities—*e.g.*, alertness, common sense, compatibility with others on a staff, drive, ethical sensitivity, judgment, originality, and how a candidate will react to unpredictable conditions. While there is considerable agreement about the necessity of these qualities for effective performance of many jobs, there is much less agreement about how to detect these qualities in candidates for hiring or promotion. Nor is there consensus about what constitutes effective job performance for business managers, doctors, industrial engineers, judges, law clerks, research scientists, or, indeed, any person who performs a job that involves complex tasks or requires the exercise of judgment. Moreover, there is no generally recognized means of scoring potential candidates to such jobs: Subjective impressions converted to numbers are still subjective judgments that vary among individuals and over time. There is no agreed-upon control group of successful job performers against which the results of the subjective selection process may be compared. And, where work takes place on a team or faculty level, there is added difficulty in attempting to isolate and define individual effective job performance. Accordingly, commentators in the legal, industrial psychology, and personnel administration professions have almost uniformly stated that subjective selection processes do not have the "technical reliability"[23]

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of the processes (and by holding that formal substantiation of a "manifest relationship" is unnecessary). See, *e.g.*, *Zahorik* v. *Cornell*, 729 F.2d 85, 96 (2d Cir. 1984) (academic tenure decision process). These decisions, in our view, properly collapse disparate impact analysis into disparate treatment analysis with respect to subjective selection systems. The Lawyer's Committee for Civil Rights Under Law agrees, although it fails to face up to its own admission. See Amicus Br. 23-24 ("This Court has never held * * * that formal validation is the only defense to a showing that an employment practice has an adverse impact. * * * [A]n employer may be able to sustain a subjective employment practice with adverse impact that cannot feasibly be validated if, for example, the employer offers evidence to show * * * that subjectivity is not being used to mask intentional or unintentional discrimination.").

[23] By "technical reliability" we mean the measurement of the extent to which the quantitative description of the amount of some trait an individual possesses or manifests remains constant when that trait is evaluated a number of times or by a number of people. See E. Ghiselli, *Theory of Psychological Measurement* 208 (1964). High "technical reliability" is a necessary but not

that is a necessary precondition of validation or other formal substantiation method.[24]

In suggesting that Title VII should be read to require that subjective selection processes be validated or otherwise formally substantiated, petitioner and her amici, especially the American Psychology Association (APA), gloss over this problem of "technical reliability"[23] and, indeed, take a position that is flatly inconsistent with both the APA's own professional principles and prior representations that the APA's members have made to-

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sufficient condition for "technical validity." See W. Cascio, *Applied Psychology In Personnel Management* 147-148 (2d ed. 1982).

[24] For a sampling of the commentary, see, e.g., *McDonnell Douglas Corp.*, 441 U.S. at 806 n.21; *Guardians Ass'n* v. *Civil Service Comm'n*, 630 F.2d 79, 92 (2d Cir. 1980), cert. denied, 452 U.S. 940 (1981); M. Miner & J. Miner, *Employee Selection Within the Law* 145-165, 338 (1979); Blumrosen, *supra*, 63 Chi.-Kent L. Rev. at 18, 30-33, 37; Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 945, 987-988, 1026-1027 (1982); Hunt & Pazuniak, *Special Problems in Litigating Upper Level Employment Discrimination Cases*, 4 Del. J. Corp. L. 114, 128-134 (1978); Gwartney, Asher, Haworth & Haworth, *supra*, 54 Notre Dame Law. at 641-643; Lerner, Washington *v.* Davis: *Quantity, Quality and Equality in Employment Testing*, 1976 Sup. Ct. Rev. 263, 286-289, 299-300; Larson, § 76.34, at 15-87 to 15-95; Note, *Evaluation of Subjective Selection Systems in Title VII Employment Discrimination Cases: A Misuse of Disparate Impact Analysis*, 7 Cardozo L. Rev. 549, 580-582 (1986).

[23] More specifically, they engage in a strategy of confession and avoidance with respect to this "technical reliability" point. For example, the APA admits (Br. 9) that the psychometric soundness of a selection device depends on its "technical reliability" as well as on its "validity." But rather than concede that technical unreliability makes formal substantiation of subjective selection processes impossible, the APA skips over the issue (*ibid.*); it suggests instead (Br. 14-21) that, with sufficient resources and time, psychometricians frequently can restructure, quantify, and otherwise objectify subjective selection processes in ways that, under laboratory conditions, allow them to be validated in ways similar to which objective selection processes are validated. But this response begs the question. It is of course true that, by converting subjective processes into largely objective ones, validation theories applicable to objective processes may be applied to processes that were formerly entirely subjective. But the question here is whether subjective judgments may themselves be formally validated or substantiated. As noted above, on this point the commentators agree that subjective selection processes cannot be so substantiated.

this Court.[26] Moreover, they fail to appreciate that a selection process may contribute significantly to productivity or other business-related needs even though it is unreliable by the "technical criteria" of the psychology profession (and accordingly cannot be validated or otherwise substantiated). There simply is no scientific way of measuring how good subjective judgments are.[27] Yet it is extreme and unwarranted to insist that

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[26] By their own terms, the *Principles for the Validation and Use of Personnel Selection Procedures* 2 (3d ed. 1987), upon which the APA relies in its brief, do no more than "present ideals toward which the members of this Society and other researchers and practitioners are expected to strive." Moreover, they warn that "the importance of adherence to the *Principles* depends on the consequences of error which may result in physical, psychological, or economic injury to people or reduce the safety or operating efficiency of the organization" and therefore that they are "*not* written as law" (*id.* at 2, 3 (emphasis in original)). In that spirit, Division 14 of the APA advised this Court in 1975 that, notwithstanding over one hundred years of research, "the technology of psychological testing and other employee selection procedures remains relatively embryonic" and that "*it is manifestly inappropriate for this profession to impose its ideals upon employers charged with meeting legal requirements while maintaining a profitable business*" (APA Amicus Br. 9, 28 (emphasis added)), in *Washington* v. *Davis*, *supra*). Indeed, Division 14 of the APA complained that the EEOC and the lower federal courts had "*tended to impose an increasing number of professionally unrealistic and effectively unattainable requirements as the bare minimums acceptable * * * in establishing whether tests and other selection procedures are demonstrably job-related*" (*id.* at 20 (emphasis added)). Accordingly, it is not easy for us to understand on what basis the APA now suggests (Br. 2-4, 6-9, 28-30) that Title VII should be interpreted as requiring employers to validate their selection processes – subjective or objective – under the strict standards set forth in the *Principles*. In any event, the APA fundamentally misunderstands the prohibitions of Title VII: Congress prohibited discrimination in employment decisions; it did not prohibit "wrong" decisions or "errors" (APA Br. 16-17).

[27] The APA errs in suggesting (Br. 14-21) that employers can establish content or criterion-related validity by training decisionmakers and objectifying interviews and performance appraisals. While standardized interview questions may be content valid, neither the responses given by candidates nor the interviewers' subjective judgments concerning the completeness or style of the response can be validated for content. See Larson § 76.33, at 15-85 to 15-87. Likewise, criterion-related validation is impossible; no matter how many past selections a decisionmaker has made, one cannot readily predict the outcome of an equal number of his future subjective decisions. See *ibid.* Thus, the APA apparently concedes (Br. 25) that creation of subjective "constructs" may be

such judgment therefore be rigidly eschewed. "In the aggregate, heightened probabilities for excellence are not a function of the validity of any particular selection device," but "are the result of a total situation in which vast numbers of employers are free to experiment with an unlimited number of possible qualitative requirements, discarding those that seem unsatisfactory and replacing them with others that seem more promising, and so on and on, in a continuing, open-ended process" (Lerner, *supra*, 1976 Sup. Ct. Rev. at 304-305).[28]

2. Ruling that the disparate impact theory is applicable to decisions resulting from subjective selection processes would, therefore, create an irresistible incentive for employers to abandon subjective selection processes in favor of objective ones or, where such replacement is too difficult or expensive, to eliminate the statistical disparity by superimposing quotas upon them.[29] Neither result would be consistent with the intent of the 1964 Congress.[30]

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necessary to validate these objectified decision processes. But, as several courts have noted, "construct validation" builds on content and criterion validation and, accordingly, cannot practicably be conducted where content and criterion validation are infeasible. See, *e.g.*, *Guardians Ass'n* v. *Civil Service Comm'n*, 630 F.2d at 92; *Douglas* v. *Hampton*, 512 F.2d 976, 985 (D.C. Cir. 1975).

[28] Accord, M. Miner & J. Miner, *supra*, at 143; Blumrosen, *supra*, 63 Chi.-Kent L. Rev. at 18; Maltz, *Title VII and Upper Level Employment – A Response to Professor Bartholet*, 77 Nw. U. L. Rev. 776, 789 (1983); Hunt & Pazuniak, *supra*, 4 Del. J. Corp. L. at 133; Lerner, *supra*, 1979 Sup. Ct. Rev. at 23; Gwartney, Asher, Haworth & Haworth, *supra*, 54 Notre Dame Law., at 642 n.20.

[29] Even petitioner's most vocal supporters disagree with her assertion (Br. 39-41, 44-49) that employers would not be forced down one of these two roads. See, *e.g.*, Bartholet, *supra*, 95 Harv. L. Rev. at 1026-1027 ("Another result might be increased pressure for quota or racially proportionate hiring among those satisfying certain minimum qualifications[,] * * * [f]or it will probably be difficult to demonstrate the job-relatedness and business necessity of many of these selection systems, in large part because it is difficult to determine what good performance is and how to measure it. * * * Selection on a racially proportionate basis seems an appropriate solution."); Blumrosen, *supra*, 63 Chi.-Kent L. Rev. at 17, 35-36 (same).

[30] Petitioner errs in suggesting (Br. 26-29) that the intent of the 1972 Congress is relevant here. In 1972, Congress did not amend the language of Section 703(a)(1) and (2) in any pertinent respect. See Equal Employment

As this Court has noted, "Title VII would not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business" (*Steelworkers* v. *Weber*, 443 U.S. 193, 206 (1979)). See also *Firefighters* v. *Cleveland*, No. 84-1999 (July 2, 1986), slip op. 16-18; *Sheet Metal Workers* v. *EEOC*, No. 84-1656 (July 2, 1986), slip op. 27-39. These legislators' resistance arose from their belief that "[a]ny attempt to prescribe the qualifications that employers may or may not use in job selection necessarily conflicts with a value that is deeply held by members of a broad spectrum of American society—the value of employer autonomy" (Maltz, *supra*, 77 Nw. U. L. Rev. at 789).[31] These "legislators demanded as a price for their support [a concession] that 'management prerogatives, and union freedoms [would] be left undisturbed to the greatest extent possible' " (*Weber*, 403 U.S. at 206 (citation omitted)). Thus,

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Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103. Thus, it is the intent of the 1964 Congress that controls the interpretation of these provisions. See *Teamsters*, 431 U.S. at 354 n.39.

In any event, the legislative history of the 1972 amendments does not support petitioner's thesis that Congress extended *Griggs* to subjective selection processes. While the floor debate and committee reports reflect a congressional concern with "systemic" or "institutional" discrimination in the public and private sectors, those concerns were expressed during a debate about the appropriate scope of the EEOC's enforcement authority and of Title VII itself (in terms of the employers that it covered). See, *e.g.*, S. Rep. 92-415, 92d Cong., 1st Sess. 4-5 (1972); H.R. Rep. 92-238, 92d Cong., 1st Sess. 21-22 (1972); 118 Cong. Rec. 1815-1816 (1972) (remarks of Sen. Williams); 117 Cong. Rec. 31960 (1972) (remarks of Rep. Perkins). Congress concluded this discussion by conferring broad litigating authority upon the EEOC, including the authority to bring "pattern or practice" suits in federal court, and by extending the coverage of Title VII to cover public employers, including the federal government. See *General Telephone Co.* v. *EEOC*, 446 U.S. 318, 325-329 (1980) (reviewing legislative history). Thus, while petitioner has correctly identified a problem that concerned the 1972 Congress, she fails to appreciate that Congress resolved that problem without "transform[ing] the substantive standard governing employer conduct." *Johnson* v. *Transp. Agency*, No. 85-1129 (Mar. 25, 1987), slip op. 9 n.6.

[31] See, *e.g.*, 110 Cong. Rec. 15893 (1964) (remarks of Sen. McCulloch); *id.* at 14314 (remarks of Sen. Miller); *id.* at 13078 (remarks of Sen. Cooper); *id.* at 9601 (remarks of Sen. Fulbright); *id.* at 8500 (remarks of Sen. Allott); *id.* at 8442 (remarks of Sen. Hill); *id.* at 6562 (remarks of Sen. Kuchel).

even assuming that objective selection criteria exist or can reasonably be derived for all job categories,[12] employers cannot be required to replace their subjective selection processes with those objective criteria; to do so would create the very bureaucratization and regimentation of the employee selection process that the key legislators would not accept.

Moreover, given the generally prohibitive cost of converting subjective selection processes to validated objective ones, the more likely response of employers would be to superimpose numerical quotas on their subjective selection processes. This Court, of course, has held that Title VII *permits* employers to engage in limited forms of voluntary affirmative action. See *Johnson* v. *Transp. Agency, supra.* But the Court has also firmly asserted that Section 703(j)[13] was added to Title VII to assure that the statute would not be interpreted to "require employers or labor unions to use racial quotas or to grant preferential treatment to * * * avoid being charged with unlawful discrimination" (*Sheet Metal Workers*, slip op. 27). The congressional record is replete with comments "that employers would not be *required* to institute preferential quotas to avoid Title VII liability" (*Weber*, 443 U.S. at 207 n.7 (emphasis in original)). Thus, a rule of law that would "leav[e] * * * employer[s] [with] little choice * * * but to engage in * * * subjective quota system[s] of employment" would be "far from the intent of Title VII" (*Albemarle Paper Co.*, 422 U.S. at 449 (Blackmun, J., concurring in the judgment)).

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[12] Of course, this is an unrealistic assumption. For many employment decisions, especially those involving professional or managerial positions, a complete and sufficient range of such objective criteria does not exist. See *Rogers* v. *Int'l Paper Co.*, 510 F.2d 1340, 1345 (8th Cir.), vacated on other grounds, 423 U.S. 809 (1975); *Gottlieb* v. *Tulane Univ. of Louisiana*, 809 F.2d 278, 283 & n.6 (5th Cir. 1987); Lerner, *supra*, 1979 Sup. Ct. Rev. at 23.

[13] Section 703(j) provides that "[n]othing contained in this subchapter shall be interpreted to require any employer * * * to grant preferential treatment to any individual or to any group because of the race * * * of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race * * * employed by any employer * * * in comparison with the total number or percentage of persons of such race * * * in any * * * area, or in the available work force in any * * * area" (42 U.S.C. 2000e-2(j)).

D. The Uniform Guidelines On Employee Selection Procedures do not Provide That Subjective Selection Processes Must Be Validated

Petitioner also contends (Br. 24, 31-32) that the Court should defer to the Uniform Guidelines on Employee Selection Procedures (1978), 29 C.F.R. Pt. 1607, which she reads as requiring the validation of subjective selection procedures. But petitioner advocates a reading of the Guidelines with which the United States and the EEOC strongly disagree.[34]

1. The Guidelines provide that the "use of any selection procedures which has an adverse impact on * * * employment * * * opportunities of members of any race, sex, or ethnic group will be considered * * * discriminatory * * * *unless* the procedure has been validated * * * *or* the provisions of Section 6 [of the Guidelines] * * * are satisfied" (29 C.F.R. 1607.3A (emphasis added)). A "selection procedure" is defined to include "[a]ny measure, combination of measures, or procedure used as a basis for any employment decision[s] * * * includ[ing] the full range of assessment techniques from traditional paper and pencil tests * * * through informal or casual interviews and unscored application forms" (29 C.F.R. 1607.16Q). Section 6 of the

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[34] Petitioner errs in suggesting (Br. 20-21, 30-34) that the EEOC has consistently interpreted Title VII as requiring subjective selection procedures with adverse impacts to be validated or otherwise formally substantiated. The EEOC first took notice in 1966 that intelligence and cognitive tests might inadvertently exclude qualified minority applicants and, at that time, issued guidelines advocating that employers refrain from using "tests" that were not job-related. See EEOC, *Guidelines on Employment Testing Procedures* (Aug. 24, 1966). But those guidelines were directed exclusively to the meaning of the phrase "professionally developed ability test[s]" in Section 703(h) of the statute (42 U.S.C. 2000e-2(h)); they were *not* addressed to other kinds of selection devices, objective or subjective. In 1970, the EEOC formally expanded its guidelines to encompass all varieties of selection procedure, including subjective selection procedures, and provided that any procedure with an adverse impact must be validated or otherwise formally substantiated. See Guidelines on Employee Selection Procedures 1607.2, 1607.13, 35 Fed. Reg. 12333, 12334 (1970). In 1978, however, when the EEOC became signatory to the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. Pt. 1607, Section 6 of the Uniform Guidelines was substituted in place of the provision of the 1970 Guidelines which required formal substantiation of subjective selection procedures. See pages 26-28, *infra*.

Guidelines goes on to state, however, that "[t]here are circumstances in which a user *cannot or need not* utilize the validation techniques contemplated by these guidelines," that such "circumstances" include the use of "informal or unscored selection procedure[s]," and that, where such informal or unscored selection procedures are involved, the user need only "justify continued use of the procedure[s] in accord with Federal law" (29 C.F.R. 1607.6B). Unfortunately, the Guidelines do not clarify how a user "justif[ies] continued use of the procedure[s] in accord with Federal law."[35] And to the extent that additional explanation concerning what the Guidelines require in such situations has been offered, the signals have been mixed.[36]

2. In the view of the United States and the EEOC, as a practical matter, an employer "justif[ies] continued use of the procedure in accord with Federal law," within the meaning of Section 6B (29 C.F.R. 1607.6B), by showing that the selection procedure is reasonably related to the requirements of the job or other business needs and has been applied in a nonpretextual fashion, as the employer would do in any disparate treatment case (and as the courts below held that respondent did in this case). Where an employer chooses to rely on the predictive value of an objective selection device, it is reasonable to require that employer to justify its reliance under the disparate impact theory. But where an employer chooses to use subjective selec-

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[35] Commentators on both sides of the debate have agreed with our characterization of the Guidelines. See Bartholet, *supra*, 95 Harv. L. Rev. at 983, 988 n.141; Larson, § 76.333, at 15-86 to 15-87.

[36] When the Guidelines were first promulgated, the prefatory comments stated that "[a] few practices may be used without validation even if they have an adverse impact. See, *e.g.*, *McDonnell Douglas* v. *Green*, 411 U.S. 792 (1973) and section 6B." 43 Fed. Reg. 38291 n.17 (1978). Six months later, in response to a question concerning how users can "justify continued use of a procedure on a basis other than validity," the agencies said, "The method of justification of a procedure by means other than validity is one to which the Guidelines are not addressed. See Section 6B." 44 Fed. Reg. 12002 (1979). The response added that, "[i]n *Griggs*[,] * * * the Supreme Court indicated that the burden on the user was a heavy one," that "the selection procedure could be used if there was a 'business necessity' for its continued use," and that "the Federal agencies will consider evidence that a selection procedure is necessary for the safe and efficient operation of a business to justify continued use of selection procedure" (*ibid.*).

tion procedures, it is unreasonable to require it to demonstrate a "manifest relationship" between the subjective process and successful job performance, for there is no practical way to do so; the employer can only show that its subjective judgments are inferentially reasonable. To require the employer to do more would simply cause it to replace its subjective selection processes with objective ones or, more likely, to superimpose quotas on its subjective systems of employment. The 1964 Congress took a clear stand that the government is precluded from creating a regulatory regime that impels employers toward either result.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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NOVEMBER 1987

U.S. GOVERNMENT PRINTING OFFICE: 1987 — 202-037/60101